United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1327

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P/S

To be argued by
ALAN SCRIBNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1327

UNITED STATES OF AMERICA,
Appellee,

—against—

ALFRED CATINO, et al.,
Appellant.

BRIEF FOR APPELLANT ALFRED CATINO

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UNITED STATES OF AMERICA,

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BRIEF FOR APPELLANT ALFRED CATINO

Alfred Catino appeals from a judgment of conviction, entered February 26, 1974, in the United States District Court for the Southern District of New York.

STATEMENT OF THE CASE

Indictment S73 Cr. 881 charged 13 defendants with eight counts of violating the narcotics laws. The appellant Alfred Catino was charged with conspiracy (Count 1) and one substantive count (Count 2) in violation of 21 U.S.C. §§812 and 814. He was tried jointly with four other defendants, Benjamin Mallah, Vincent Pacelli, Jr., Alfred DeFranco and Barney Barrett, in the United States District Court for the Southern District of New York (Pollack, D.J., and a jury). Alfred Catino was found guilty as charged and on February 26, 1974 he was sentenced as a second offender to twelve years in

prison on each count, the sentences to run concurrently. The appellant was also sentenced to six years of special parole to follow the expiration of confinement and he was fined $25,000.*

STATEMENT OF FACTS

The indictment charged a conspiracy from January 1, 1971 to the date of the indictment, September 20, 1973, to distribute and possess with intent to distribute narcotic drugs. Essentially the government's proof alleged that two groups, the Pacelli group and the Sperling group, were engaged in an enterprise to distribute heroin and cocaine, sometimes to each other, and sometimes to their own customers.**

The primary government witness was Barry Lipsky, a member of the Pacelli group. Lipsky had previously pleaded guilty to conspiracy to transport stolen stocks in Florida (57) and while a stockbroker in Florida had engaged in various other swindles (286-92). While awaiting sentence in Florida, Lipsky moved to New York where he entered the narcotics business as an associate of the defendant Pacelli. Lipsky was arrested on March 2, 1972 for murder in Nassau County*** and

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* References are to the pages of the appellants' appendix.

** This case is a companion case to United States v. Sperling, et al., Docket No. 73-2363, appeal argued April 10, 1974, decision reserved.

*** The facts of the murder case are described in this Court's opinion in United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974).

after confessing, he began cooperating with the federal authorities. In return for his testimony Lipsky was promised by the government attorneys that he would not be prosecuted for his narcotics involvement, and that his cooperation would be made known to the sentencing judge in Nassau County (386-9, 481-2). Additionally, he was promised that he would not be prosecuted for "any damn thing" he told the United States Attorneys (403-4).

Lipsky admitted that he lied before the grand jury in Florida (57, 170, 410-11) and that he lied to the judge in Florida federal court to obtain probation (523-5). He also admitted perjuring himself on the stand in two previous prosecutions in the Southern District of New York (72 Cr. 1319 and 72 Cr. 664), one in June 1972 and the other in December 1972 (58, 418-21, 422-3). In each of these cases he lied about the promises made to him by the government. Lipsky was not indicted for the perjuries in federal court and does not expect to be prosecuted for them (428). In addition, after the intervention of the United States Attorney, Lipsky was allowed to plead guilty to manslaughter in the first degree to cover the Nassau murder indictment (58, 187, 425, 481-2). When he pleaded he had already committed perjury in the federal trials and the Assistant United States Attorney who was in court for the plea told the state judge about Lipsky's cooperation, but did not mention his perjury (481-2). Lipsky's Florida probation was not revoked though he was engaged in narcotics crimes and was convicted of manslaughter

and no move has been made to revoke the probation (178-80). Additionally, while he owes $44,000 to the government, he will not have to pay it (277-81). He could be paroled from the state manslaughter sentence, an indefinite term of up to 20 years, at any time and hopes that he will be paroled soon (193). Though he is technically serving state time, he was, at the time of this trial, still under federal custody (258).

Perhaps consistent with his criminal activities, both on and off the stand, Lipsky also showed signs of severe mental aberrations. Thus, he admitted to beating his head against the wall, shooting a television set when it had mechanical troubles, heaving a scale into the ocean when it did not show he was losing weight, and mimicking TV horror shows to the television set (499-503).

Although Lipsky began cooperating with the federal authorities soon after his murder indictment in March 1972 he did not mention the appellant Alfred Catino until March 1973, a year later (507-12). On the stand Lipsky testified that he first saw Catino in the Hippopatomus Discotheque in May or June 1971 (108). Lipsky was there with Pacelli, and Catino was with John "Fuzzy" Fazzalari, but Lipsky did not speak to them (108-9). A few weeks later Pacelli and Abbe Perez told Lipsky that they were out of dilutent and Pacelli said he was going to 115th Street to get it from Fuzzy and Herbie (109-10), Herbie being the appellant Catino's nickname (119). Pacelli, Perez and Lipsky drove to the area and Lipsky

watched from the car while Pacelli and Perez walked with the appellant and Fazzalari. Later Lipsky asked Pacelli if he got the "hit" and Pacelli said he did, showing Lipsky a brown envelope which he said contained manitta. Pacelli added that it wasn't much but "it will hold us for a little bit" (109-11).

In June or July 1971 Pacelli took Lipsky to a club on 115th Street to see Catino and Fazzalari, saying "we are going to see these guys, see if I can sell them some coke or some junk" (112). Pacelli introduced Lipsky, but "nothing transpired on that occasion" (112).

Shortly thereafter Lipsky again accompanied Pacelli to the club on 115th Street. Pacelli told Lipsky that Fuzzy and Catino might want to buy junk from him. After Pacelli spoke to Fazzalari and Catino he told Lipsky that they (Lipsky and Pacelli) would take their car and "mix up some junk for these guys" (113-14). Lipsky and Pacelli then entered a red and black chevrolet and drove to the Third Avenue apartment where their drug stash was kept. They mixed three or four kilos, put it in the trunk of the chevrolet, parked the car near 115th Street and entered the club. Pacelli talked to Catino and Fazzalari and gave Catino the keys and registration to the car (114-17). Lipsky, however, did not hear the conversation between Pacelli and the appellant.

Another transaction occurred during the summer of

1971. Again Lipsky and Pacelli went to the 115th Street club, where Pacelli talked to Catino and Catino gave Pacelli keys and registration (117-18). Pacelli then told Lipsky to "mix up two keys of junk. . . for Herbie and Fuzzy", and to bring it back in the red chevrolet they used before (118). Lipsky did as instructed and returned the keys and registration to Pacelli, telling him where the car was and where in the car the drugs were (118). Pacelli then spoke to Catino (119).

Some time thereafter, Lipsky participated in another deal at the 115th Street club involving one-half kilo of cocaine. This deal was made with Fuzzy and Alfred "Skinny" DeFranco. The appellant Catino, however, was not present (119-23). In the fall of 1971 Lipsky took part in another transaction with Fazzalari and DeFranco, Catino again not being present (124-6).

Some time between September and November 1971 Lipsky went to the club with Pacelli where Pacelli conversed with Fazzalari, DeFranco and Catino. Pacelli gave Lipsky keys to a blue pontiac or buick, and Catino told Lipsky where the car was, saying that Lipsky should "put the coke in that car" (126). Lipsky did so and returned the keys to Pacelli (126-7).

Besides this testimony of Lipsky, two other items of evidence were introduced against Catino. Cecile Mileto, the wife of Louis Mileto who engaged in narcotics activities with Joseph Conforti and Herbert Sperling, testified that

she saw Catino at the Ballantine barbershop during the summer of 1971. She said she heard her husband ask Catino "if he did what he was supposed to" (209).

Mortimer Moriarity, an agent of the Drug Enforcement Administration, testified that he arrested Catino on September 26, 1973 in front of his home in the Bronx. When arrested Catino had a paper bag containing eight pharmaceutical thermometers (1253) which, when analyzed by a police chemist, contained no traces of narcotics (1256-7).

THE DEFENSE

Carl Abraham, director of a scientific consulting firm, testified that the thermometers taken from Catino were fahrenheit thermometers with a top measurement of 300 degrees farhenheit. Three hundred degrees fahrenheit is the equivalent of 148.89 degrees centigrade (1427-30). Since the testing of heroin is done with a centigrade thermometer which can measure changes at temperatures in the range of 180 degrees centigrade and higher (Lipsky, 78-9; Conforti, 665), these thermometers were useless for that purpose (1431). The thermometers taken from Catino cost a few dollars each (1437-8) and could be used for measuring the temperature in refrigerators or for biology or physics tests (1439).

On summation, the prosecutor argued forcefully that Catino had simply bought fahrenheit thermometers by mistake, implying that he meant to obtain centigrade thermemeters for testing drugs (1639-40).

POINT ONE

THE ADMISSION INTO EVIDENCE OF THE THERMOMETERS TAKEN FROM CATINO AT THE TIME OF HIS ARREST WAS REVERSIBLE ERROR

Introduction

The appellant Catino was arrested outside his home on September 26, 1973, after the return of the present indictment. When arrested he was carrying a paper bag containing eight pharmaceutical thermometers (Ex. 54 a-h), all of which were introduced into evidence. Though the defense presented proof that the thermometers were calibrated according to the fahrenheit scale, and thus could not measure the temperatures necessary to test narcotics, the government argued simply that the layman defendant had made a mistake in obtaining farhenheit rather then centigrade thermometers. The implication was thus made clear that Catino's possession of the thermometers proved his involvement with narcotics. It is appellant's contention that in the context of this case the admission of the thermometers into evidence was serious error. Not only had the conspiracy terminated by the time Catino was arrested, but the gap of two years between Catino's only acts in furtherance of the conspiracy and his arrest undercut any relevant connection between the possession of the thermometers and the crimes charged in the indictment. The only possible purpose for admitting the thermometers was to show Catino's general disposition to commit drug offenses, a purpose, which the cases make clear, will not support

admissibility of evidence of prior or subsequent similar acts. Moreover, the thermometers were extremely important, since they provided the only corroboration of Lipsky with respect to Catino. Without such corroboration Catino would undoubtedly have been acquitted, as was his co-defendant DeFranco, who was found not guilty after the jury satisfied itself that Lipsky's account of his activities was not corroborated.

I.

The indictment in this case alleged a conspiracy from January 1, 1971 to September 20, 1973, the date of the indictment. Catino was described by Lipsky as a receiver of drugs from him and Pacelli in the summer and fall of 1971. Lipsky was arrested on March 2, 1972 and Pacelli was in continuous custody since February 1972. Sperling was arrested in April 1973, as was Conforti, Mileto and DeFranco. Catino himself was also arrested in April 1973 on another charge (1161-2), and then was arrested on this case six days after the indictment was filed. Thus, by any estimate, the conspiracy charged in the indictment was over by the time Catino was arrested, not only because the arrest occurred after the termination date in the indictment, but also because all the principals had been taken into custody or were fugitives and the enterprise had been put out of business. See Krulewitch v. United States, 336 U.S. 440, 442 (1949). In this posture, Catino's possession of the thermometers falls into the category of subsequent similar acts.

It is, of course, clear in this Circuit that evidence of prior or subsequent similar acts, including crimes, are admissible for any relevant purpose. They are not, however, admissible "to show the disposition or propensity of the accused to commit the crime charged" or to show the defendant's "criminal character or disposition", United States v. Smith, 283 F.2d 760, 763 (2d Cir. 1960); United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970); United States v. Byrd, 352 F.2d 570 (2d Cir. 1965); United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967). In the present case, the only probative value of the thermometers was to demonstrate that Catino deals in narcotics. There had been no sharpening of any issue of intent, knowledge, motive, identity or common scheme or plan to permit the introduction of the thermometers under these categories. See, United States v. Byrd, supra; Spencer v. Texas, 385 U.S. 554, 560-2 (1967); Parker v. United States, 400 F.2d 248, 251-2 (9th Cir. 1968). Nor is there any other discernable relevant purpose.

In United States v. DeCicco, supra, the defendants were charged with conspiracy to transport stolen paintings in interstate commerce. Evidence was admitted that shortly before the events charged, two of the conspirators had attempted to sell two other stolen paintings. This Court reversed the conviction, holding that such evidence is "not admissible to show the disposition, propensity or proclivity of an accused to commit the crime charged" and that there was

no other purpose for admitting the evidence:

> Such evidence is indeed not irrelevant; it is the kind of proof that in ordinary affairs we constantly use; we reason that, if a man has been guilty of unlawful or immoral conduct on other occasions, especially those that concern the same subject matter, there is an initial probability that he was guilty of the specific charge at bar. It is inadmissible, however, because it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused.
> 435 F.2d at 483

In Diaz-Rosendo v. United States, 364 F.2d 941 (9th Cir. 1966) the defendants were charged with conspiracy to import drugs into the United States. Agents had intercepted a marijuana-laden vehicle at the border, arrested the occupants, and then, with one of them cooperating, drove to a meeting point. There the appellants approached the car and ascertained that "everything is set." They were then arrested, and the next day a search of the car which the appellants drove turned up a bag with a small quantity of marijuana. The Circuit Court reversed the appellants' conviction on the ground that the evidence of the marijuana in his car was inadmissible. "We do not see how, or in what manner, it can be said that whatever crime may have been committed in the possession, transportation, or concealment of such marijuana, it in any way relates to or tends to prove the commission of the separate and distinct crimes set forth in the indictment." 364 F.2d at 944.

In the present case, the thermometer evidence is

even more remote. Catino was implicated by Lipsky for acts committed in 1971, two years before his arrest. His possession of pharmaceutical thermometers two years later does not tend to show he was guilty of the crimes charged in the indictment, except insofar as it tends to show a proclivity, disposition or propensity to engage in narcotics transactions. Indeed, the government utilized the thermometer evidence in just this way during its summation. For the prosecutor argued essentially that there was no legitimate explanation for Catino's possession of eight pharmaceutical thermometers (1639-40). The inference was inescapable that Catino had them because he was generally engaged in narcotics and would use them to test drugs. Such inferences are precisely what the cases concerning proof of other similar acts seek to prevent. Even if Catino may have been testing drugs on September 26, 1973, after the conspiracy had ended and two years after he committed the acts Lipsky alleged, it would still have nothing to do with the transactions the jury could consider. The thermometer evidence was therefore inadmissible.

II.

The admission of the thermometers was, furthermore, extremely prejudicial, and cannot be viewed as harmless error under the view of the case taken by the jury. The only evidence against Catino besides Lipsky and the thermometers was the brief allegation of Cecile Mileto that she saw Catino in Ballantine's barbershop, where her husband

asked the appellant "if he did what he was supposed to" (209). Clearly, this added almost nothing to the government's case against Catino. The thermometer evidence thus stands as the only real support of Lipsky's allegations against Catino. Without it the jury would have to rely on Lipsky's word alone that Catino was involved in the conspiracy. And, as is clear from the record, the jury acquitted wherever Lipsky was not corroborated by other proof.

The prime example clearly demonstrating the jury's view occurred with respect to the co-defendant DeFranco. DeFranco was implicated by Lipsky in the same fashion as Catino, each allegedly engaging in several narcotics transactions of the usual sort described by Lipsky (119-27). Indeed, Lipsky testified that on one of the several deals with DeFranco, DeFranco personally gave Lipsky the keys to the car where Lipsky was supposed to place the drugs, and Lipsky personally returned the keys of the then drug-laden car to DeFranco (120-1). Yet, despite Lipsky's clear and inculpatory testimony against DeFranco, the jury in its deliberations sent a note to the court (Ex. 57) asking, "Please let us know if anyone other than Lipsky testified against DeFranco. If there is other testimony, may we have it?" (1734-5). When the jury was informed that there was no one other than Lipsky (1735-6), DeFranco was found not guilty (1774). Obviously, the only way to understand the difference in verdicts as to Catino and DeFranco was simply that the government had other proof against Catino besides Lipsky, namely

the thermometers, while such extrinsic evidence was lacking for DeFranco. Indeed, even Pacelli was acquitted on substantive counts where Lipsky was not corroborated (1174-5). Thus, it is completely clear that were it not for the erroneous admission of the thermometers, the prejudice it engendered and the corroborative support it gave to Lipsky, Catino would almost certainly have been acquitted.

POINT TWO

THE DEFENSE WAS WRONGFULLY PRECLUDED FROM CROSS EXAMINING LIPSKY ABOUT THE DETAILS OF HIS PARTICIPATION IN THE MURDER OF PATSY PARKS, A CRIME FOR WHICH THE WITNESS HAD BEEN CONVICTED

Introduction

In February 1972, a few days before the scheduled trial of an indictment against Vincent Pacelli, federal narcotics agents attempted to serve a subpoena on one Patsy Parks, a witness who had testified before the grand jury which issued the indictment.* Upon learning that the agents sought her, Ms. Parks went to the Hippopatomus Discotheque where she told Barry Lipsky that she urgently wanted to see Pacelli about the subpoena. Lipsky quickly taxied to New Rochelle to inform Pacelli about this development, where, apparently, a plot was hatched to kill Ms. Parks. Lipsky and Pacelli then drove back to Manhattan, buying four one-gallon cans of gasoline "to burn up the girl's body". Pacelli and Lipsky then took the prospective government witness for her last ride. According to Lipsky's testimony at Pacelli's trial for the killing, Lipsky replaced Pacelli at the wheel and Pacelli murdered the girl, stabbing her in the throat and drowning her pleas with the cry of "Die, you bitch". Lipsky then drove to a wooded area where the body was thrown from

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* The facts relating to the murder of Patsy Parks are culled from this Court's opinion in United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974).

the car and after Pacelli had doused the body with gasoline, Lipsky set Patsy Parks on fire. Later that night Lipsky took $20 from the victim's purse, discarded the purse and then tossed the murder knife into the water.

Lipsky was eventually indicted for murder in Nassau County in connection with the killing and made two complete confessions of his guilt. He felt, naturally, that he was "in extremely serious trouble" (463) and, as he wrote to Assistant United States Attorney Feffer in December 1972, he was despondent because the state authorities would not consider allowing him to plead guilty, they were out for his blood, and the case was open and shut against him (466-80; Ex. 3576). Lipsky then sought the aid of the United States Government in connection with the murder case, exchanging narcotics information for federal assistance (471, 476-8). After intervention by the federal prosecutors, Lipsky was permitted to plead guilty to manslaughter in the first degree, and received an indeterminate sentence of twenty years in jail, for which parole was immediately available (58, 193, 481-2).

At the trial below, counsel sought to cross-examine Lipsky about the details of the Patsy Parks slaying. The court, however, restricted the examination only to the fact of the indictment, plea and sentence, and the aid given by the government in obtaining the plea (436-7, 440-6). It is appellant's contention that the court's limitation on cross-examination was serious prejudicial error, preventing a fair

trial. Cross-examination about the details of the crime was sought not for impeachment value per se, a reason which would have been satisfied by the judge's restricted view of the extent of the cross, but, more importantly, an exploration of the details of the crime bore significantly on the nature of the consideration shown to Lipsky by the government. It is, after all, one thing to intercede in a murder case where there may be extenuating circumstances of some kind, but quite another to intercede in Lipsky's behalf where he brutally murdered a government witness. Without disclosure of the details of the crime, the jury could not fully appreciate the extent of the consideration the government gave to Lipsky, nor could it fully appreciate the depth of Lipsky's debt to the government attorneys or the strength of his motive to testify for them. Moreover, the way the crime was committed reflects upon Lipsky's sanity, and therefore on his competence and believability as a witness. Thus, appellant contends the correct course was that adopted by Judge Ward in United States v. Catino, 73 Cr. 329, an earlier trial of the appellant in which he was acquitted. There, the court allowed full exploration of the details of the murder of Patsy Parks when Lipsky was cross-examined.*

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* Since Pacelli was also a defendant in the trial below, a question arose as to the possibility of Lipsky's prejudicially implicating Pacelli if cross-examined about the details of the killing of Patsy Parks. However, counsel for Pacelli pointed out that on prior trials where Lipsky was examined "in none of those cases did Lipsky testify as to the identity of his alleged accomplice" (438). In any event, even if Pacelli were implicated, the proper remedy would be a severance, and not the preclusion of this area of cross-examination by Catino. See, United States v. Fields, 458 F.2d 1194 (3d Cir. 1972); United States

I.

In attempting to impeach Lipsky's credibility the defense is, of course, entitled to establish his previous criminal convictions, the nature of each of the crimes charged, the date and time of each conviction and the length of the sentence imposed. United States v. Ramsey, 315 F.2d 199 (2d Cir.) cert. denied, 375 U.S. 883 (1963); Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966); Arnold v. United States, 94 F.2d 499, 506, 509 (10th Cir. 1938). Ordinarily, the impeaching party may not go into the details of the crime underlying the criminal conviction where this is done solely to impeach on the basis of the prior criminal act. United States v. Tomaiolo, 249 F.2d 683, 687 (2d Cir. 1957). But where these details are relevant to establish the witness' possible bias or motive to testify falsely, they may be shown either through cross-examination or through extrinsic evidence. Davis v. Alaska, ___ U.S. ___; 39 L.Ed.2d 347 (1974); United States v. Masino, 275 F.2d 129 (2d Cir. 1960); United States v. Padgent , 432 F. 2d 701 (2d Cir. 1970).

In United States v. Masino, supra, it was held to be substantial error not to permit the defendant to examine

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(Cont'd)

v. Valdez, 262 F. Supp. 474 (D. P.R. 1967); United States v. Gleason, (Karp), 259 F. Supp. 282 (S.D.N.Y. 1966); United States v. Magnotti, 51 F.R.D. 1 (D. Conn. 1970).

two prosecution witnesses as to alleged "rewards" provided them by the government prior to their testimony. One witness, a government informant, was a former narcotics user, who had been arrested on a state charge for possession of a syringe and a hypodermic needle, which charges the defense claimed had been dismissed in the state court as a result of government intervention. The other witness was defendant's alleged accomplice. On direct examination, the government brought out that the accomplice had earlier been indicted for his participation in the transaction involving the defendant, that he pleaded guilty and was on probation. The record indicated that the accomplice had pleaded guilty solely to the third count of the indictment and that two other counts relating to a prior sale of narcotics had been dismissed. When the defense sought to establish the disposition of the other two counts, the government's objections to these questions were sustained. On appeal, it was held to be substantial error to restrict the defendant's cross-examination aimed at showing lenient treatment by government officials prior to pro-prosecution testimony at defendant's trial:

> When a witness in a criminal case is being questioned as to his possible motives for testifying falsely wide latitude should be allowed in cross-examination. . . Indeed, where the principal witnesses appearing in behalf of the prosecution. . .have engaged in illegal practices. . . it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit. . . .
>
> 275 F.2d at 132-3

In Davis v. Alaska, supra, the Supreme Court held that where the motive of the witness in testifying was an issue, full exploration of the details of his prior conviction must be permitted in order to satisfy the Confrontation Clause of the United States Constitution. Even the fact that the prior conviction was a youthful offender adjudication, a judgment generally not available for impeachment purposes, could not prevent cross-examination into the details of the witness' prior crime. Indeed, the Supreme Court concluded that the trial court's exclusion amounted to "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." 39 L.Ed.2d at 355.

In this case, the defense sought to establish that Lipsky's state plea to manslaughter, his indeterminate sentence and immediate eligibility for parole, was extraordinarily lenient treatment for the crime which he committed. Not only were there no extenuating circumstances which might call for leniency, but the government went out of its way to persuade state authorities, previously opposed, to aid the murderer of a government witness. In such a case one might rationally expect the government, whose own witness was killed, to press for the fullest possible penalty for the killers; or, at the very least, to let justice take its course without aiding any of the perpetrators. Here, they did just the opposite. They affirmatively took steps to assist Lipsky in the state, and were instrumental in obtaining the lesser plea that the state

prosecutors were opposed to. Indeed, on sentencing, the government further protected Lipsky by telling the judge about his cooperation, but failing to mention the significant fact known to them that Lipsky's "cooperation" included perjury in two federal trials (481-2). In any event, the jury could hardly appreciate the extent of the government's consideration to Lipsky without first being aware of the details of the gruesome crime Lipsky committed. Nor could they fully appreciate Lipsky's motive to testify for the government until they understood the exact extent to which the government went to aid him. In short, while the jury knew that the government assisted Lipsky in obtaining a plea in a homicide, they did not know that the crime was a premeditated and brutal murder of a government witness. The difference between the two is apparent and enormous, and the jury should have been aware of it when considering Lipsky's motive to testify falsely.

In addition, the details of Lipsky's participation in the killing of Patsy Parks raise serious doubts concerning his mental competence, a factor which the jury is entitled to consider in evaluating his credibility and determining what weight should be given his testimony. United States v. Tannuzzo, 174 F.2d 177 (2d Cir.), cert. denied, 338 U.S. 815 (1949); United States ex rel. Lemon v. Pate, 427 F.2d 1010 (7th Cir. 1970); Gurelski v. United States, 405 F.2d 253 (5th Cir. 1968); United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950). With knowledge of the details of the murder, of

Lipsky coolly driving the car while the victim was stabbed to death over her cries for mercy, and of Lipsky coldly setting fire to the gasoline-drenched body of Patsy Parks, the jury could well have concluded -- what may well be the fact -- that Lipsky is insane. The verdict, obviously, could easily have been affected by such a view. Indeed, when complete cross-examination into the details of Lipsky's murder of Ms. Parks was allowed by Judge Ward in an earlier trial of the appellant Catino (73 Cr. 329), the jury acquitted.

POINT THREE

THE COURT'S REFUSAL TO ALLOW IMPEACHMENT OF THE WITNESS CONFORTI BY EXTRINSIC EVIDENCE THAT HE ATTEMPTED TO EXTORT MONEY IN ORDER TO INFLUENCE HIS TESTIMONY CONSTITUTED REVERSIBLE ERROR

During cross-examination Joseph Conforti, a principal government witness, testified that in October 1973, while in the protective custody of the government, he telephoned Sam Kaplan, an indicted conspirator who had just been acquitted in the Sperling trial (73 Cr. 330). Conforti told Kaplan that unless he paid $10,000 someone, whose name he would not mention to Kaplan, would implicate Kaplan in another case (778-80, 1783-1811). Conforti testified that he made the call on the instructions of Jack Spada, an indicted conspirator in the instant case (778-80), and described himself simply as "a messenger boy between Jack Spada and Sammy Kaplan" (783). Conforti added that he then contacted Spada and told him that Kaplan didn't have the money (781). Counsel sought to prove, both from evidence of a tape recording of the conversation between Conforti and Kaplan and from other testimony, including that of Sam Kaplan, that the date of the call from Conforti to Kaplan was October 28 (1313-21), and that Conforti lied about his agency and contacts with Spada because Spada died on October 26 (978-9, 1320). The point obviously was that Conforti himself, and not Jack Spada, had tried to extort money from Kaplan and would tailor his testimony on the stand

in accordance with the compensation he received, rather than the truth. The trial court's refusal to allow impeachment of Conforti in this regard amounted to reversible error, infecting the whole government case.

I.

In United States v. Haggett, 438 F.2d 396 (2d Cir. 1971) this Court reversed a conviction where the trial court refused to allow independent defense proof that a prosecution witness had attempted to suborn perjury.

> The reason, of course, for allowing a defendant to introduce extrinsic evidence as to a witness's attempt to suborn perjury is that such conduct indicates a corrupt intent on the part of that witness which necessarily affects his credibility.
>
> 438 F.2d at 400

Haggett thus is consistent with a long line of cases holding that motive to testify falsely is never collateral, and may be proved by extrinsic evidence. E.g., Davis v. Alaska, ___ U.S. ___, 39 L.Ed.2d 347 (1974); United States v. Lester, 248 F.2d 329 (2d Cir. 1957); United States v. Campbell, 426 F.2d 547 (2d Cir. 1970); United States v. Blackwood, 456 F.2d 526 (2d Cir. 1972); 3 Wigmore, Evidence, §960.

Similarly, in United States v. Briggs, 457 F.2d 908 (2d Cir. 1972) a government agent was allowed to give extrinsic evidence that an undercover informant, and government witness, had told him that the defendant had twice threatened his life if he did not testify in an exculpatory manner. In upholding the introduction of this proof Judge Friendly wrote

that "whether the receipt of such threats be characterized as showing 'bias,' or 'corruption' or 'interest', their relevance as impeaching (the witness') testimony is too apparent to require argument. It is plain that impeachment of this sort is not limited to cross-examination." 457 F.2d at 910-11.

The present case is obviously comparable. If Conforti himself would conform his testimony to the interest of the highest bidder, instead of to the truth, his corrupt motive and intent when giving evidence would be apparent. The fact that Kaplan was not a defendant in this action, as the court below pointed out, therefore becomes meaningless. For, as Briggs makes clear, it is the witness' corruption and interest which is the issue. Here, Conforti admitted to government consideration in return for his testimony (646-7), and, if he was amenable to changing his testimony depending on who made the best offer, it is easily inferable that his motive in testifying here was primarily to please the government. Indeed, if the extrinsic evidence offered by the defense here were believed by the jury, it would "color every bit of testimony given by the witness whose motives are bared." United States v. Blackwood, 456 F.2d 526, 530 (2d Cir. 1972).

II.

While not every item of extrinsic evidence is always admissible to show a witness' motive (but see, Davis v. Alaska, supra), the test, at least before Davis, was whether "the jury was otherwise in possession of sufficient information

concerning the formative events to make a discriminating appraisal of a witness' motives and bias." United States v. Campbell, 426 F.2d 547, 550 (2d Cir. 1970); United States v. Blackwood, supra. In the present case, the jury was under the impression it was not Conforti, but Spada, who had a corrupt motive to testify falsely, since Conforti alleged that he was merely Spada's messenger in the extortion scheme. Obviously, it would have made a great deal of difference if the jury believed that Conforti himself was the one who intended to color his testimony, and that Conforti had lied on the stand when he put the blame on Spada, a dead man who could not contradict him. Consequently, the extrinsic evidence was clearly admissible in this case, and if believed, would have significantly affected the jury's view of Conforti's testimony.

III.

While Conforti did not directly implicate Catino, counsel for Catino joined in the motion to offer the extrinsic evidence of Conforti's extortion attempt (1321). For Conforti's testimony was received against everyone on the conspiracy count, and proof that he was tailoring his testimony to suit the government's view of the case would necessarily affect every defendant on trial.

More significantly, Conforti described fully his narcotics dealings with Louis Mileto and Herbert Sperling, the head of one of the two drug rings involved in this case. The government attempted to show an association between Catino and

Sperling and Mileto by eliciting from Cecile Mileto the fact that she saw Catino several times at the Ballantine barbershop with her husband and Herbert Sperling (207-8). Furthermore, the court in marshalling the evidence against Catino specifically drew attention to his association with Sperling (1701). Since association with other conspirators has a bearing on Catino's participation in the conspiracy, Conforti's evidence, which inculpated Sperling as an important drug dealer, also had a bearing on Catino. Thus, the refusal to permit impeachment of Conforti and his testimony adversely affected Catino's defense.

Additionally, in United States v. Haggett, 438 F.2d 396 (2d Cir. 1971), this Court held if the extrinsic evidence that the government witness attempted to suborn perjury were believed by the jury, "reasonable doubt as to the veracity of other prosecution witnesses could certainly have arisen. Proof that one government witness unsuccessfully attempted to suborn perjury of other witnesses could have led a jury to doubt the veracity of other government witnesses -- the jury perhaps suspecting that these witnesses were successfully bribed to testify falsely." 438 F.2d at 399. In the same vein, Conforti's willingness to conform his testimony to the party who gave him the most consideration could lead the jury to believe that other government co-conspirator witnesses, such as Lipsky, would be similarly inclined. Thus, the government's case against the defendants on trial, built on the fragile supports of accomplices who stood to benefit from their testimony, could easily collapse if it were shown that one of the principals had actually sought

to sell his testimony. Accordingly, the refusal of the court to allow impeachment of Conforti requires a reversal as to all defendants on trial.

POINT FOUR

THE FAILURE OF THE GOVERNMENT TO PROSECUTE LIPSKY FOR ANY OF HIS THREE ACTS OF PERJURY, AND LIPSKY'S EXPECTATION THAT HE WOULD NEVER BE PROSECUTED FOR HIS PERJURY, DESTROYED THE VALIDITY OF THE OATH WHICH QUALIFIED HIM AS A WITNESS AT THIS TRIAL. LIPSKY WAS THEREFORE NOT COMPETENT TO TESTIFY

On trial Lipsky admitted that he had committed perjury on three separate occasions. He lied to a federal grand jury in Florida (57, 170, 410-11), and he perjured himself from the witness stand in two trials in the Southern District of New York, one in June 1972 and the other in December 1972 (72 Cr. 664 and 72 Cr. 1319) (58, 418-21, 422-3). On cross-examination Lipsky acknowledged that he has not been prosecuted for any of the three perjuries he committed and confidently asserted, "I don't expect to be" (428). It is appellant's contention that Lipsky's de facto immunity from punishment for perjury undercut the validity of the oath which qualified him as a competent witness in this case. For the message of government forebearance in the face of three crimes of perjury was that Lipsky could lie without fear of punishment. But a valid oath entails just the opposite.

Rule 26 of the Federal Rules of Criminal Procedure, while not mentioning the oath, refers the competency of a witness to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." However, it has been squarely held that "for all testimonial statements made in court the oath is a requisite." United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971);

VI Wigmore, Evidence, §1824 (2d ed. 1940); see also, 51 F.R.D. 385 (proposed federal rule). At common law, in order to be a competent witness, a person must "understand the nature of an oath, consider himself bound by the obligation thereof, and understand that there may be punishment for false swearing." 97 C.J.S. 455, and cases cited therein; see also, Carter v. United States, 332 F.2d 728 (4th Cir. 1964). As stated in Wigmore, the form of the oath is immaterial, "provided that it involves in the mind of the witness, the bringing to bear of this apprehension of punishment". VI Wigmore, Evidence, §1818; United States v. Looper, 419 F.2d 1405, 1406 (4th Cir. 1969). While the modern trend, of course, eschews rigid rules of incompetency and favors the admission of testimony, leaving its weight for the jury (see, On Lee v. United States, 343 U.S. 747 (1962)), the present situation is a highly unusual one, apparently without precedent in the case law. After all, the government is usually zealous to protect the integrity of the federal courts, and a witness who admits to three separate acts of perjury in this forum should not expect a complete lack of retribution.

However, if a witness is assured that he will not be punished even if he lies under oath, the oath logically becomes meaningless, since the "apprehension of punishment" does not exist. If the witness cannot take a meaningful oath, he is obviously incompetent to testify. Here, the failure of the government to prosecute Lipsky for any of his three perjuries, and Lipsky's confident expectation that he never would be

prosecuted for his false swearing achieved the same result. For there was nothing to persuade Lipsky that if he lied during the present trial he would suddenly now be prosecuted. There was thus no reason for Lipsky to consider himself bound by the obligation of the oath or to fear punishment, since he had already breached his oath three times with impunity. Thus, while Lipsky may have understood that technically he could be prosecuted if he lied again, the government's failure to punish him for his past perjuries must have made him realize that he was actually immune from a perjury charge. In this context, it must be understood that this is not a case where the government's discretion could reasonably be exercised to refuse prosecution for one act of perjury, with the understanding that it must not occur again. Rather, Lipsky lied three times, twice within the confines of the Southern District, without evoking punitive action. There must be some point when the government's failure to prosecute a perjurious witness would undercut the validity of the oath he takes. If there were none, Lipsky could lie in case after case with only the risk of appellate reversal or mistrial. We would submit that three overlooked perjuries are more than enough to render such a witness incompetent to testify, since the viability of his oath has been destroyed, and a witness is not competent unless he understands that perjury is punishable.

Moreover, this is also not a case where a witness, previously convicted of perjury, remains competent to testify.

See, Schoppel v. United States, 270 F.2d 413 (4th Cir. 1959); United States v. Margolis, 138 F.2d 1002 (3d Cir. 1943). It is not because Lipsky perjured himself that he is incompetent; rather, it is precisely because he was not prosecuted that he is incompetent as a witness. For unless a consistently lying witness is prosecuted, he will not understand the obligations of the oath at any later trial. Thus, we would submit that the three unpunished perjuries Lipsky committed rendered him incompetent as a matter of law to testify at the trial below.

POINT FIVE

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE APPELLANT CATINO ADOPTS THE POINTS AND ARGUMENTS OF CO-APPELLANTS

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

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